No. 14,613

United States Court of Appeals

For the Ninth Circuit

HOMER C. MILLS,
Appellant,

vs.

UNITED STATES OF AMERICA, ex rel. Securities and Exchange Commission,
Appellee.

Appeal from the United States District Court for the District of Nevada.

OPENING BRIEF OF APPELLANT.

HOMER C. MILLS,
Searchlight, Nevada,
Appellant in Propria Persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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STATEMENT OF PLEADINGS AND FACTS.

(Note.) For convenience the appellee will be referred to as the Commission.

Appellant was found guilty of four counts of criminal contempt involving an alleged violation of the provisions of an injunction issued by the District Court of the United States, for Nevada in civil case No. 1000 which record is before this Court as an exhibit. Imposing of sentence was suspended for three years and defendant was placed on probation. (Tr. 56-58.)

The injunction enjoined the Corporation defendant therein named and Homer C. Mills from selling or offering for sale through Interstate Commerce: "the common capital stock 10¢ par value of Defendant Searchlight Consolidated Mining & Milling Company, a Corporation, through the use or medium of a prospectus, or otherwise, unless or until a registration is in effect with the Securities and Exchange Commission as to such securities; provided, that this injunction shall not apply to such security or any transaction if exempted from the provisions of Section 5 of the Securities Act of 1933, as amended, 15 U.S.C.A. 77c". (Tr. 24-25.)

The complaint in civil case No. 1000 was very brief and charged the corporation defendant and appellant were engaged or were about to engage in acts and practices which constituted or would constitute violations of Section 5 (a) (1) of the Securities Act of 1933, as amended, 15 U.S.C. 77e (a) (1b) and further alleged that the action was pursuant to Section 20 (b) of the Act 15 U.S.C. 77t (b) and that the action arose under Section 22 (a) of the Securities Act of 1933, as amended, 15 U.S.C. 77v (a). It was further alleged that no registration statement with respect to such securities had been in effect with the Commission.

The prayer of the complaint was for injunctional relief, but it contained the following proviso:

> "that the foregoing shall not apply to any security or securities transaction which is exempt

from the provisions of Section 5 of the Securities Act of 1933, as amended." (Tr. 67-68.)

The defendants denied the material allegations of the complaint and set out the defense that since about May 24, 1951, the Corporation defendant had been and was acting pursuant to an exemption granted by the Commission for the sale of its securities under Section 3 Subdivision (11) (b), which answer was filed without prejudice to motions filed to dismiss. (Tr. 70-72.)

The motion to dismiss contained 14 separate grounds (Tr. 72-78) but was mainly based on the grounds that the Court had no jurisdiction to grant injunctive relief. (Tr. 78.)

The entire proceedings in civil action No. 1000 was heard on documentary evidence and stipulations as to certain facts. There was no dispute as to any facts in the record.

From the facts in the record, it was established that the Corporation defendant had in all respects complied with Section 3 (11) (b) of the Securities Act and that the Commission made no claim that the "letter of notification" was not properly filed or was deficient in any respect. (Tr. 74.)

The gist of the transaction was found to be outside of any issue made by the complaint and consisted of the Corporation defendant having mailed to its shareholders, about 400 in number, certain letters sent to all existing shareholders between May 24, 1951 and

November 15, 1951, soliciting additional investments by them, upon the belief that these were private transactions exempted under several provisions of the Securities Act and were not in the nature of a public offering and for that reason it had not filed with the Commission copies of such letters before use. The Corporation upon its attention being called to said matter, discontinued such practice and disclaimed any intention of ever sending out similar solicitating letters without first filing copies thereof with the Commission. (Tr. 78.)

The four counts upon which the trial Court found the defendant guilty of contempt grew out of the sale by defendant of shares of stock owned by him personally theretofore issued to him by the Corporation and standing on the books of the Company in his name and in each instance were transfers from him to the purchaser as shown by the following facts:

John Antich purchased from appellant December 11, 1952, 1000 shares of stock in Searchlight Consolidated Mining & Milling Co., belonging to appellant and paid $100.00 therefor (Tr. 25-26) for which he received Certificate No. 1113 and on the transfer stubs of the Company stockbook there was contained the following notation—"H.C.M. $100.00". (Tr. 46.)

Lena Sultana acquired Certificate No. 1119 for $200.00 paid to appellant receiving 2000 shares transferred from appellant. (Tr. 47.)

Jack Zweigle and his order received Certificates Nos. 1138-39-40, totaling 4000 shares for which he

paid $400.00 (Tr. 31-32) and these were shown to have been transferred from the holdings of appellant. (Tr. 48.) There were letters exchanged between Zweigle and appellant wherein the appellant stated to him "the Company is not interested in selling any more of its shares" and that the appellant would let him and his friends have some of his personally owned shares at 10¢ per share "which will carry the same rights as the Company shares". (Tr. 30.)

One O'Brien, an investigator for the Commission, filed his affidavit showing, among other things, the four matters complained of to-wit: Antich, Sultana, Zweigle, and Albany, (Tr. 44-48) and of the stock transactions shown on the stubs of the stockbook, all were transfers except Certificate 1108 for 2000 shares to the McKinleys, 1000 of which was Treasury stock. (Tr. 46.)

In the contempt hearing, the appellant filed his affidavit (Tr. 51-54) setting forth the facts of the stock transfers and also that the only Company stock issued subsequent to the injunction was 1000 shares to the McKinleys which they acquired personally at Searchlight, Nevada; further in the affidavit of the appellant, it is shown the company attempted to solicit further investments from its shareholders and filed with the Commission copies of the proposed letters but they were never used because of the objections of the Commission. The Corporation still maintains all times it had and still has a valid exemption under Section 3 (11) (b) of the acts in question.

This appeal is from the judgment in the contempt matter. (Tr. 58-59.)

QUESTION OF JURISDICTION.

1—The jurisdiction of the trial Court in the injunction action was conferred upon it by Section 20 of the Securities Act of 1933, as amended, Subdivision (b) wherein it is provided that whenever it appears to the Commission that any person engaging in or is about to engage in *any acts or practices* which will constitute a violation of the provisions of the act *or any rules or regulations prescribed under authority thereof,* the Commission may in its discretion bring an action in any District Court of the United States, *"to enjoin such acts or practices"* and upon a proper showing an injunction may be granted. This jurisdiction is created by statute and is limited to restraining a continuance of the *acts and practices complained of.* (Italics ours.)

2—This appeal raises the question of the jurisdiction of the trial Court in the contempt proceedings to render any judgment against appellant—because—

(a) the injunction in civil case No. 1000 was a nullity and of no force or effect;

(b) the undisputed facts before the Court in the contempt proceedings show that the appellant did not, in any manner, violate the injunction in question.

SPECIFICATION OF ERRORS.

1—That the trial Court erred in finding the appellant guilty of contempt of Court and in rendering judgment thereon because the evidence was insufficient to support the charges or any of them and that such findings were contrary to the evidence and the law.

POINTS AND AUTHORITIES.

1—The injunction issued in civil case No. 1000 was void because issued without jurisdiction and had the effect of removing the Corporation defendant from the protection of the law of the land.

N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U.S. 361, 50 L.ed. 515, 26 S.Ct. Rep. 272.

2—The Commission cannot enact laws in the guise of rules and regulations, as this power alone is vested in Congress.

Art. 1, Sec. 1 and Art. 1, Sec. 8, Clause 18, Constitution of the United States;

Jones v. United States, 298 U.S. 1, 80 L.ed. 1015, 56 S.Ct. 654.

ARGUMENT.

Appellant does not consider a lengthy argument necessary on this appeal because the entire case is based on the charge that he used the mails to sell the

Common Capital stock of the Corporation defendant, whereas in truth and in fact, the evidence of the Government without dispute establishes no stock of the Corporation defendant was sold, and in those four instances where shares were sold, they belonged personally and wholly to the appellant, and the Corporation had no interest therein.

There is no law to prevent an owner of property from selling and conveying it to whom he pleases.

Through inadvertence the preliminary injunction obtained on April 3, 1952, restrained the Corporation and defendant Mills from using the mails to sell the Common Capital stock of the company, "or any other securities", but the trial Court in the contempt matter stated it was inadvertently placed therein and should not have been included and that he was disregarding it. (Tr. 121.)

A bare reading of Section 20 of the Securities Act of 1933, as amended, Subdivision (b) discloses that whatever jurisdiction the trial Court had in civil action No. 1000 was created by statute, and the statute limited the jurisdiction of the Court to the issue as to whether a given defendant was engaging in or was about to engage in any acts or practices which would constitute a violation of the Act, or any rules or regulations prescribed under authority thereof. The trial Court had no jurisdiction whatever to go beyond the limits of this statute.

Again, the defendants in civil action No. 1000 were brought into Court on the unfounded and misleading

charge of having acted without a registration statement in effect when the Commission well knew and the facts readily disclosed that the Corporation defendant did not need a registration statement in effect, but had a valid, existing and binding qualification and permit and was selling exempted securities issued and authorized under Section 3, Subdivision (11) (b) of the Act in question, consisting of an authorization allowed and granted by the Commission in the amount of $300,000.00, authorized by its rules and regulations, which the Corporation defendant complied with in all respects.

Congress in qualifying securities by use of registration statements and those qualified as exempted securities did not discriminate in favor of one as against the other and each has equal standing and dignity under the law and before the Courts.

The actual facts in civil case No. 1000 disclose the normal situation of the Corporation defendant sending to four hundred of its shareholders two certain circular letters soliciting additional funds under the belief that it was not necessary to file copies of these with the Commission, because they were believed to be exempted securities under the statute. There was no issue in the pleadings with reference to these facts, but the Court found that by reason of having sent these communications the Corporation defendant and appellant herein should be forever restrained from all future efforts to sell exempted securities.

Since when can private litigants be brought into a Court of Justice and be charged with and found

guilty of a state of facts not in existence as shown by the complaint and a permanent injunction issued when no charges have been made as to the real facts, and they have never been given an opportunity to defend such charge?

When the true facts were developed in civil action No. 1000 the proceedings should have been dismissed.

The Corporation defendant stated in the injunction proceedings that in the future it had no objection to filing with the Commission copies of its proposed letters to its shareholders and this was all the Corporation was obligated to do. There is no provision in the Securities Act of 1933, as amended, to authorize a suspension or termination of a permit to proceed to market securities when once issued, and at the time the two circular letters were sent there was nothing in the rules or regulations of the Commission providing that it could suspend or terminate a permit.

Since this action arose and was tried in civil action No. 1000 the Commission has attempted to legislate, in detail, provisions for denial and suspension of any exemptions provided for by it under Section 3, Subdivision (11) (b) of the Act, (see rule 223 effective February 1, 1954 by the Commission).

It is clear that Congress alone can enact laws, and that Congress could not and did not delegate to the Commission authority to legislate in any manner or to any extent. (See Points and Authorities.)

Under the provisions of Subdivision (11) (b), Section 3 of the Act dealing with exempted securities,

we assume that the Commission did its duty when it received a notification of the Corporation defendant shown in civil case No. 1000, and that it found as a fact that the enforcement of the title of the Securities Act of 1933, as amended, with respect to the securities proposed to be offered by the Corporation defendant was not "necessary in the public interests and for the protection of the investors by reason of the small amount involved or the limited character of the public offering" and the amount did not exceed $300,000.00. With this finding, the Corporation defendant secured a valid permit to market exempted securities, and there was no manner in which this right could be taken away from it, and this must be conceded because the Commission thereafter sought to authorize it to suspend such permits but if legal this would be retroactive as to the Corporation defendant, and could not be applied to its permit.

CONCLUSION.

In concluding this brief, the appellant submits that this appeal is well taken and the charges should be reversed and dismissed because the trial Court in the first instance had no jurisdiction to grant the injunction and it was absolutely void and a complete nullity and further the acts complained of by the Government and found true as to alleged contempts in this

matter were in no manner prohibited by the injunction.

Dated, Searchlight, Nevada,
August 1, 1955.

Respectfully submitted,
HOMER C. MILLS,
Appellant in Propria Persona.